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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

MAR - 1 1996

In the Matter of	)	
	)	
Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band	)	PR Docket No. 93-144 RM-8117, RM-8030, RM-8029
	)	
Implementation of Section 3(n) and 332 of the Communications Act -- Regulatory Treatment of Mobile Services	)	GN Docket No. 93-252
	)	
Implementation of Section 309(j) of the Communications Act -- Competitive Bidding (800 MHz SMR)	)	PP Docket No. 93-253

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To: The Commission

REPLY COMMENTS OF CELLCALL, INC.

CellCall, Inc. ("CellCall"), by its attorneys and pursuant to Section 1.415 of the Commission's Rules and the Order, DA 96-18, released January 16, 1996, hereby submits its reply to the comments filed on February 15, 1996 in response to the Second Further Notice of Proposed Rule Making ("Second Further NPRM"), FCC 95-501, released December 15, 1995, in PR Docket No. 93-144. The following is respectfully shown:

I. Summary

1. CellCall owns and operates conventional and trunked specialized mobile radio stations throughout a three-state area in the midwestern United States. Given the number and

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extent of CellCall's channel holdings, CellCall is likely to be both a wide-area licensee and an "incumbent licensee"[1/] under the Commission's new rules governing the transition to wide-area licensing for 800 MHz SMR facilities. Consequently, CellCall will be substantially affected by the proposals contained in the Second Further NPRM.[2/] CellCall's reply is limited to certain issues of importance to both incumbent and new EA licensees that were raised in the Second Further NPRM, particularly issues related to the mandatory relocation of incumbent licensees.[3/]

II. The Commission Should Adopt Final Rules for the Lower 80 SMR and General Category Channels Before Auctioning Licenses for the Upper 200 SMR Channels

2. Under the wide-area licensing plan adopted in the First Report and Order in PR Docket NO. 93-144, new EA licensees will have the right to "relocate" incumbent licensees to "comparable facilities" in the 800 MHz band. 47 C.F.R. § 90.699.

1/ 47 C.F.R. § 90.7; § 90.693(a).

2/ CellCall has previously participated in the Commission's protracted efforts to adopt wide-area 800 MHz SMR licensing rules. See, e.g., Comments and Reply Comments, filed January 5, 1995 and March 1, 1995, respectively, in response to Further Notice of Proposed Rule Making in PR Docket No. 93-144.

3/ Because some of the issues raised in the Second Further NPRM have been the subject of previous comments in this docket, the Commission should give due consideration to such comments to the extent they are responsive to issues raised in the Second Further NPRM. These filings include Comments and Reply Comments in response to the Further Notice of Proposed Rule Making in PR Docket No. 93-144, 10 FCC Rcd. 7970 (1994) and various ex parte comments filed in response to the Wireless Telecommunications Bureau's September 18, 1995 meeting to discuss issues in the docket (see Public Notice, DA 95-1965, released September 12, 1995).

It is expected that such comparable facilities will in almost all instances be located in the lower 80 SMR channels and the General Category channels. Clearly, these relocation channels are of critical importance to the success of the Commission's plan for relocating incumbent licensees, and CellCall concurs with the Commission's decision to initiate a proceeding at this time to put in place new rules for these channels.

3. An issue not generally discussed in the comments is the timing of (1) the auction of upper band wide-area SMR licenses for which the Commission adopted rules in the Eighth Report and Order in PP Docket No. 93-253[4/] and (2) the auction of geographic licenses for the lower 80 SMR channels and General Category channels which the Commission has proposed in the Second Further NPRM. PCIA believes that the auction of lower 80 and General Category channels should be held only after the relocation process for upper SMR channel licensees is complete, all construction dates for incumbent systems have passed, all unconstructed channels have been recovered, and incumbents have had an opportunity to convert their licenses to geographic licenses (pursuant to a plan described by PCIA and others).[5/]

4/ FCC 93-501, released December 15, 1995.

5/ Comments of Personal Communications Industry Association ("PCIA"), at p. 18. CellCall generally supports the licensing and relocation plan for the lower 80 and General Category channels proposed by SMR Won and others. See Comments of SMR Won at p. 8; Comments of Nextel, Inc. ("Nextel") at p. 6; Comments of American Mobile Telecommunications Association, Inc. ("AMTA") at p. 17.

4. CellCall agrees with PCIA. Moreover, the same rationale for delaying the auction of the lower 80 and General Category channels -- removal of uncertainty -- also supports delaying the auction of upper band EA licenses until after final rules for the lower 80 and General Category channels are adopted. The greater certainty engendered by having final rules in place for these relocation channels will give incumbents incentive to relocate and benefit all parties to the relocation process.[6/]

III. CellCall's Position on Issues Related to Mandatory Relocation of Incumbent Upper SMR Channel Licensees

A. All Affected EA Licensees Should Share Relocation Costs

5. CellCall agrees with the comments in support of the Commission's proposal that EA licensees share relocation costs on a pro rata basis, based on the actual number of an incumbent's channels located in the EA licensees' respective blocks. NPRM, para. 269.[7/] CellCall also agrees with PCI that the first EA licensee to reach an agreement with an incumbent should have a right to "step into the shoes" of the incumbent and continue negotiating with other affected EA licensees.[8/] However, the Commission should clarify that, with respect to

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6/ CellCall also agrees with that relocated incumbents would not be subject to relocation a second time. Second Further NPRM, para. 315; Comments of Pittencrief Communications, Inc. ("PCI") at p. 5; PCIA Comments at p. 15.

7/ AMTA Comments at p. 11; Nextel Comments at p. 16-17; PCI Comments at p. 4; Comments of The Southern Company ("Southern") at p. 19.

8/ PCI Comments at p. 5.

incumbents who have been notified of intended relocation by an EA licensee and thus may demand that all affected EA licensees negotiate simultaneously,[9/] the negotiations should include not only the EA Spectrum Block A, B, and C licensees (i.e., the 120-channel, 60-channel, and 20-channel block licensees) within a single EA, but all EA Spectrum Block licensees whose EAs encompass areas covered by the incumbent's system. Relocation costs then should be shared among all such EA licensees.[10/] In this manner, the incumbent will ensure that its entire "system" is relocated, as the Commission has proposed.

6. The commenters disagree about whether "premium" payments made by an EA licensee should be included in the shared costs that will be divided on a pro rata basis between all benefitting EAs.[11/] CellCall agrees with commenters who oppose requiring all EA licensees to share in premium costs negotiated and incurred by one EA licensee.

B. AMTA's Suggestion of a Form of Notification Is Useful

7. CellCall agrees in principle with AMTA's suggestion that the Commission provide incumbents with a formal notification regarding the retuning of subscriber units.[12/]

9/ This right, which is referred to in paragraph 78 of the First Report and Order, should be expressly codified in rule section 90.699(b)(1).

10/ See AMTA Comments at pp. 10-11.

11/ Compare PCI Comments at p. 6 with Southern Comments at pp. 19-20.

12/ AMTA Comments at p. 13.

However, AMTA's perception of the need for such a notification -- "to help incumbents explain to recalcitrant customers that the retuning process is mandatory"[13] -- is excessively narrow. The notification, which should go to incumbents and then may be passed on by them to their customers, should briefly explain that the FCC's rules provide a one-year voluntary negotiation period, followed by a two-year mandatory period, and that the incumbent (and its subscribers) may be relocated only to comparable facilities on 800 MHz channels. As associations representing the interests of various industry members, AMTA, PCIA, and ITA are well-positioned to develop such a form of notification.

C. Comparable Facilities

8. CellCall agrees with comments generally supportive[14] of the Commission's proposal that "comparable facilities" should, at a minimum, provide the same level of service as the incumbents' existing facilities, and should include (a) the same number of channels with the same bandwidth; (b) relocation of the incumbent's entire system; and (c) a 40 dBu contour that encompasses all territory covered by the 40 dBu contour of the incumbent's original system. Second Further NPRM,

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[13] Id.

[14] Southern Comments at p. 20; Comments of Fresno Mobile Radio, Inc., et al. ("Fresno") at pp. 17-18; Comments of Duke Power Company ("Duke") at p. 6; Comments of E.F. Johnson at p. 5; Comments of The Ericsson Corporation ("Ericsson") at p. 2; Comments of Digital Radio, L.P. ("Digital") at p. 6; Comments of Genesee Business Radio Systems, Inc. ("Genesee") at p. 3; AMTA Comments at p. 15; PCI Comments at pp. 6-7; Nextel Comments at p. 24.

para. 283. CellCall also agrees with various commenters that, in addition to the Commission's proposal, "comparable facilities" should include the following:

- co-channel separation at least as good as that of the original frequencies, and preferably full 70-mile co-channel protection.[15/]
- substitute equipment that is no older and has no fewer features than existing equipment;[16/]
- features and functionalities at least equivalent to the systems being replaced (i.e., the same signaling compatibility; the same baud rate; the same access to data on every channel; the same access time; the same number of IDs; the same subscriber feature sets; the same number of priority levels that existed on the replaced systems).[17/]
- modification or replacement of all mobile and control units using the incumbent's system, and their ancillary equipment.[18/]
- relocation to spectrum that has the same propagation characteristics as existing spectrum;[19/]
- exclusive use of relocation channels, with no greater interference potential to the incumbent's system on the relocation channels than on its current channels;[20/]
- retuned frequencies are fully compatible in a multi-channel system at the incumbent's present location.[21/]

15/ Comments of Industrial Communications & Electronics, Inc. ("IC&E") at p. 7; AMTA Comments at p. 15.

16/ AMTA Comments at p. 15.

17/ Ericsson Comments at p. 3.

18/ GP and Partners Comments at pp. 2-3.

19/ Digital Comments at p. 6.

20/ Fresno Comments at p. 18.

21/ Duke Comments at p. 6.

9. In addition, with respect to the retuning process, CellCall agrees that every mobile unit in a fleet must be reprogrammed at the same time, without disruption of service;[22] and that incumbents must have the rights to retune subscribers themselves[23] and to select the equipment vendor, if necessary.[24]

D. "System" Should Be Defined Broadly

10. CellCall agrees with IC&E that, for purposes of determining what facilities comprise an incumbent's system, any analog facilities identified as participating in an incumbent's wide-area system, and any overlay digital grants, should be included.[25] As noted by IC&E, allowing an EA licensee to consider a "system" only those frequencies associated with base stations currently operating and the mobiles that currently use them, as suggested by some commenters,[26] would be disruptive to an incumbent's wide-area licensee's channel plan. Therefore, the Commission should define "system" broadly to provide sufficient protection to incumbents.[27] Furthermore, the Commission should reject comments suggesting that an incumbent demonstrate through

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[22] PCIA Comments at p. 16.

[23] Genesee Comments at p. 2.

[24] AMTA Comments at p. 15.

[25] IC&E Comments at pp. 4-5.

[26] See AMTA Comments at p. 16; Nextel Comments at p. 22; PCI Comments at p. 7.

[27] Comments of Centennial Telecommunications, Inc. at p. 6.

"billing records, mobile programming records, or other reliable evidence" to verify that the mobile units proposed for retuning are directly associated with the base station within the EA.[28/] The Commission must not lose sight of the fact that EA licensees and incumbents are competitors generally vying for the same customer base; there is too great a chance for anti-competitive behavior if the Commission requires such information to be disclosed during relocation negotiations.

E. Definition of "Actual Relocation Costs"

11. In the Second Further NPRM, the Commission states that "[c]omparable facilities would be limited to actual costs associated with providing a replacement system and would exclude any expenses incurred by the incumbent without securing the approval, in advance, of the EA licensee. During the mandatory negotiation period, "only the bare essentials of comparability should be required." Second Further NPRM, para. 286. According to the Commission, "actual relocation costs" would include, at a minimum, equipment, towers and/or modifications; back-up tower equipment; engineering costs; installation; system testing; FCC filing costs; site acquisition and civil works; zoning costs; training; disposal of old equipment; test equipment; spare equipment; project management; and site lease negotiation.

[28/] Nextel Comments at p. 22; PCI Comments at p. 7.

Second Further NPRM, para. 272.[29] Also included should be certain cost items discussed by various commenters, including a reasonable amount for administrative and marketing costs and for time spent negotiating relocation terms;[30] increased operating costs, including rental expenses;[31] all equipment and labor costs related to reprogramming and/or replacing mobile units;[32] and the loss of revenue caused by a loss of customers to the new EA licensee.[33]

F. Timing of Relocation and Payments

12. Relocation must be accomplished efficiently and expeditiously in order to reduce the impact on incumbent licensees. Thus, CellCall agrees that incumbents should not have to finance the costs of relocation, and that therefore the relocating EA licensee should be required to demonstrate, either by posting a completion bond, placing funds in escrow, or some other means, that it has the necessary funds to complete the relocation in a timeframe that does not disrupt the incumbent's

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[29] Although included in the Commission's discussion of what relocation costs should be shared among EA licensees, the same definition presumably applies in determining what relocation compensation must be given to incumbents.

[30] See Digital Comments at p. 4; Fresno Comments at p. 8; Comments of SMR Systems, Inc. ("SSI") at p. 4.

[31] Fresno Comments at p. 9.

[32] Ericsson Comments at p. 3; Duke Comments at p. 6.

[33] Digital Comments at p. 4; SSI Comments at p. 4.

operations.[34/] This also will provide security to other EA licensees who may have negotiated relocation terms with the responsible relocating EA licensee.

G. Good Faith Negotiations

13. A number of commenters disagree[35/] with the Commission's tentative conclusion that during the mandatory negotiation period an offer by an EA licensee to replace an incumbent's system with comparable facilities constitutes a "good faith" offer. Second Further NPRM, para. 286. This disagreement stems from the perceived presumption that EA licensees will be allowed to dictate what constitutes good faith.[36/]

14. The issue in the first instance is likely to be whether or not an offer of comparable facilities has been made by the EA licensee. Thus, the Commission should clarify that under its proposal either the incumbent or the EA licensee has a right to allege bad faith: an incumbent may do so if the EA licensee does not offer comparable facilities, and an EA licensee may do so if an incumbent rejects an offer deemed comparable by the EA licensee. The burden of proof should be on the entity alleging bad faith (but not solely on the EA licensee) to prove, as Duke Power suggests, on the basis of clear evidence indicating

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[34/] See E.F. Johnson Comments at pp. 5-6; Fresno Comments at p. 10; Genesee Comments at p. 3.

[35/] Digital Comments at p. 7; SSI Comments at p. 8; Duke Comments at p. 14; Fresno Comments at pp. 19-20.

[36/] See, e.g., Digital Comments at p. 7.

specific efforts to abuse and/or circumvent the Commission's relocation policies.[37] Because all circumstances will differ, the Commission also should clarify that an incumbent should not be presumed to be acting in bad faith if it does not accept terms and conditions of relocation that have been accepted by other incumbents.

H. The Commission Should Adopt General Guidelines for Dispute Resolution

15. CellCall agrees with Nextel that disputes between incumbents and EA licensees about reimbursement costs, comparability, and good faith, as well as disputes between EA licensees about cost sharing, should be resolved under the auspices of an independent third party, and that decisions should be appealable to the Commission.[38] However, the Commission should establish general guidelines for the use of dispute resolution, including what body or bodies may serve as initial arbiters and the extent of their authority. In particular, the Commission should establish a deadline of 180 days in which the arbiter must reach a decision during the mandatory relocation period.

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[37] Duke Comments at p. 14.

[38] Nextel Comments at p. 23.

WHEREFORE, the foregoing premises duly considered, CellCall requests that the Commission adopt rules consistent with the foregoing.

Respectfully submitted,

CELLCALL, INC.

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CERTIFICATE OF SERVICE

I, Nadine Smith-Garrett, hereby certify that I have on this 1st day of March, 1996, caused a copy of the foregoing Reply Comments of CellCall, Inc. to be mailed via first-class United States mail, postage prepaid, to the following:

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